

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
AUTOMOBILE CLUB OF NEW YORK, : Docket #11cv6746  
 : 1:11-cv-06746-RKE-HBP  
Plaintiff, :  
- against - :  
THE PORT AUTHORITY OF NEW YORK : New York, New York  
AND NEW JERSEY, : June 19, 2012  
Defendant. :  
----- :

PROCEEDINGS BEFORE  
HONORABLE HENRY PITMAN,  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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THE CLERK: Automobile Club of New York against the Port Authority of New York and New Jersey. Counsel, please state your name for the record.

MR. KEVIN MULRY: For plaintiff, AAA, Kevin Mulry and Michael Fitzgerald from Farrell Fritz. With us also is Marta Genovese, counsel at AAA. Good afternoon, Your Honor.

HONORABLE HENRY PITMAN (THE COURT): Good afternoon.

MS. KATHLEEN MILLER: Good afternoon, Your Honor, Kathy Miller for the Port Authority of New York and New Jersey, and with me is David Kromm and Carlene McIntyre.

THE COURT: All right, good afternoon. We're here outstanding resolve the discovery disputes that are raised in the June 15 joint letter that I received from counsel. And I'd like to go through the issues in the order in which they appear in the letter.

All right, the first topic is identified as "the Port Authority should be required to respond to the document request by stating whether or not they will be producing all responsive documents." I thought the Port Authority's position, as set forth in the letter, clarified that. And I understand them to be saying - well, let me ask Miss Miller. I understand the Port Authority to be saying that with, except for the exceptions specifically noted in the letter,

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that the Port Authority is producing all responsive documents in its possession, custody, or control.

MS. MILLER: That's correct, Your Honor. Now, we haven't finished --

THE COURT: Right.

MS. MILLER: -- you know, we've done this document poll, the email poll. And the other issue that remains outstanding which the Court raised with plaintiff, and I did raise with plaintiff too in our conversation before this letter, and that is with respect to the allocations to the bond fund which has been raised several times, what level of granularity did they want to go to, and I didn't get a response from plaintiffs on that. So I know they don't want the daily receipts from the George Washington Bridge because that's been scoffed at. But the next level, they have been given the annual allocation to the consolidated bond fund, that was exhibit H.

The next level of granularity below that, and I have endeavored to pull that on my own, and I'll provide that, would be the monthly allocations. I can provide the monthly allocations. And then that, for some reason, doesn't answer the question, whatever question is in plaintiff's mind, we'll have to come back and discuss further what level granularity they want to go to with

1  
2 respect to the bond funds.

3           And, again, I think perhaps there's been some lack  
4 of understanding of the Port Authority's financial  
5 statements which are posted online. I think perhaps I can  
6 assist counsel by giving them copies of those schedules that  
7 we believe show the allocation, the 10 percent allocation to  
8 the general reserve fund, another topic that counsel has  
9 raised with us. Those are actually in schedules that are  
10 attached to the Port Authority's annual financial statements  
11 which are posted online.

12           If it would assist counsel, we'll pull those  
13 schedules, copies of those schedules, and we'll give them  
14 those schedules and so that they'll have them and they'll  
15 know what it is we're saying in particular supports the  
16 exhibits to the Fabiano affidavit. And I tried to explain  
17 to counsel that the exhibits to the Fabiano affidavit which  
18 were submitted in support of our motion to dismiss, in  
19 opposition to the preliminary injunction, were documents  
20 created to this litigation. They were created, they were  
21 extracted from the annual financial statements to show that  
22 the interstate transportation network, in fact, loses a  
23 significant amount of money. And they were --

24           THE COURT: I'm not trying to cut you off, but I  
25 think you may be getting beyond what topic 1 was addressing.

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I'm not trying to cut you off, but I think you've --

MS. MILLER: Well, topic 1 covers quite a --

THE COURT: -- gone several yards beyond it.

MS. MILLER: -- few of the requests, and I can't, as I stand here now and look at perhaps 20 numbers here, I can't remember which ones went to the consolidated bond fund. So I'm trying to address that generally.

THE COURT: No, but my understanding is that the issue there was really sort of one as to the completeness of the Port Authority's response. Is that --

MR. MULRY: Yes, that's correct.

THE COURT: -- the issue you were raising?

MR. MULRY: That's correct, Your Honor --

THE COURT: And my understanding is, except for the specific exceptions described in the Port Authority's position, the Port Authority is providing all responsive documents in his possession, custody, or control.

MR. MULRY: Our understanding --

MS. MILLER: Right, and with the exception of going to the level of granularity that plaintiff --

THE COURT: Right.

MS. MILLER: -- wanted with the consolidated bond reserve fund and the general reserve fund.

MR. MULRY: Our understanding based on what's

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said in the letter and what's been said in court is that unless there's a stated objection to one of the responses, the Port Authority is producing all responsive documents within their custody and control.

THE COURT: Well, except, I mean, again, except for the last point that Miss Miller raised.

MR. MULRY: Right.

THE COURT: I mean you're not looking for the daily counts on tolls and things like that.

MR. MULRY: The general concern with the first category is that from the document response it's not clear that the Port Authority is saying that it's producing all responsive documents. That's our understanding based on what's been said in letters and in court.

THE COURT: Okay.

MR. MULRY: Your Honor, if you wanted me to address the consolidated bond fund and the reserve fund now, I can do that or whichever order --

THE COURT: I'm not even sure that was really one of the topics raised here, was it?

MR. MULRY: Well, there is - towards the end with respect to we anticipate making a motion --

THE COURT: Okay. All right.

MR. MULRY: With respect to the --

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THE COURT: Let's go through the letter in the order set out in the letter.

With respect to the litigation hold, I'm not sure, you know, I understand plaintiff's point. I'm not sure there's an issue to be resolved here at this point or if plaintiff is seeking some relief. If plaintiff is seeking some relief, it's not clear to me what that is. So maybe you want to elaborate on that a little bit, Mr. Mulry.

MR. MULRY: Your Honor, we don't believe there's an issue immediate. We did want to alert the judge, alert Your Honor to this issue and what we see as a significant concern. If emails are automatically deleted after 120 days and a written litigation hold was not in place until May 25, that would only take you to January of this year 2012. It wouldn't capture anything from 2011 which includes the summertime of 2011 when the toll increase was being proposed and when it was approved in August of 2012.

So we raise that as a concern at this point, although I don't believe there's an issue to be presented to the court. It was raised at the last conference, so we wanted you to be aware that we see that as a very significant issue in the case.

MS. MILLER: Your Honor, may I respond to that?

THE COURT: Okay.

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2 MS. MILLER: I mean I pretty much said it in my  
3 letter. In the first place plaintiffs told the court, in  
4 open court, that, back on October 6, within a few days after  
5 having commenced this lawsuit, that they didn't want any  
6 discovery. So there was no reason for the Port Authority to  
7 issue a major litigation hold. We spoke verbally to those  
8 people in management and budget and finance who were sizing  
9 the toll increase and working on it and told them to  
10 preserve any documents that they had.

11 It wasn't until Judge Holwell came down with his  
12 decision denying their application for preliminary  
13 injunction and indicating that he was converting our motion  
14 to dismiss to a motion for summary judgment and allowing  
15 limited discovery that plaintiff suddenly came forward with  
16 57 categories of document requests.

17 But fortuitously, even though there is an  
18 automatic delete 120 days after an email is created, the  
19 major player, so to speak, in this case, David Sampson, the  
20 Chairman, Patrick Foye, the Executive Director, William  
21 Baroni, the Deputy Executive Director, Karen Eastman, the  
22 Secretary, Michael Fabiano, the Chief Financial Officer,  
23 Christopher Ward, the former Executive Director, and their  
24 assistants all had litigation holds on their computers for  
25 prior matters so that, absent a delete by any of those

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2 individuals, there would not be an automatic cleanup on  
3 their computers. And that went back to the Greek Church  
4 case and that predates this litigation.

5 So we're not really - the major decision-makers at  
6 the Port Authority have litigation holds on their computers  
7 and anything would have been preserved unless that  
8 individual deleted. Now, I can't control --

9 THE COURT: Well, again, I'm not trying to cut  
10 you off, but I'm not sure there's anything to be resolved at  
11 this point because they're not seeking, the plaintiffs are  
12 not seeking any relief at this point with respect to the  
13 fact that the litigation hold was not put in place until May  
14 25. I mean whether this is an issue down the road is  
15 something that should probably be addressed down the road.

16 I mean at this point I'm either, I mean they're  
17 not asking me to bless or condemn what the Port Authority  
18 has done, and I'm not sure you're asking me to bless or  
19 condemn what the Port Authority has done.

20 MS. MILLER: No, but I'm highlighting that for  
21 the key players that litigation hold, there was already a  
22 litigation hold in place from other cases on their  
23 computers.

24 THE COURT: I'm not sure that we need to prolong  
25 the discussion though because there's nothing to be decided

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in this regard.

MS. MILLER: Very well.

THE COURT: Okay?

MR. MULRY: Your Honor, if I could just address one inaccuracy in the letter, and just now Port Authority counsel was asserting that AAA had told Judge Holwell that we didn't want any discovery. That's not accurate. The question was whether there would be discovery, early discovery with respect to the preliminary injunction application, and the judge - AAA did ask Judge Holwell to rule on the preliminary injunction application without discovery so that it would not be broken up in piecemeal. But if the case going forward --

THE COURT: Was there a record before Judge Holwell?

MR. MULRY: I don't know that any conferences were described, but in his opinion - and this is at page 14 of Judge Holwell's decision - he said, "While the Court offered AAA an opportunity for early discovery in connection with its application for a preliminary injunction, no such offer was extended in connection with the Port Authority's motion," referring to the motion to dismiss which he was converting to a motion for summary judgment.

So in the decision itself, Judge Holwell

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2 recognizes that the issue of whether there should be  
3 discovery was directed to the application for a preliminary  
4 injunction.

5 MS. MILLER: Well, that's true, but there was no  
6 caveat issued at the time.

7 THE COURT: I'm not --

8 MS. MILLER: That they --

9 THE COURT: I'm not --

10 MS. MILLER: That they were reserving.

11 THE COURT: I'm still confused about what we're,  
12 what issue there is to be resolved with respect to the  
13 presence or absence of the litigation hold.

14 MR. MULRY: Judge, from AAA's perspective there's  
15 no issue to resolved. I didn't want to let that --

16 THE COURT: I understand. I understand why you  
17 said it.

18 MR. MULRY: -- that issue unresponded to.

19 THE COURT: Miss Miller, what'd you want to say?

20 MS. MILLER: Judge, I don't believe that - I was  
21 sitting in another courtroom in the Eastern District and  
22 participating in that conference by phone, but I'm unaware  
23 as to whether that conference was recorded. We would have  
24 to inquire. I can tell you that my memory of that  
25 conference, that telephone conference was there was no

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2 statement by counsel on the record that they didn't want  
3 discovery now but they might want discovery later. There  
4 was no such reservation. And, in fact, I have no  
5 recollection of they're coming in on the motions saying that  
6 the motion shouldn't be decided because they didn't have  
7 discovery and they needed discovery.

8 So the push for discovery came following the  
9 decision by Judge Holwell at the end of February, and --

10 THE COURT: Well, maybe it's an interesting  
11 question as to whether or not counsel's representations  
12 concerning discovery, if any such representations were made,  
13 have any effect on the legal obligation to put a litigation  
14 hold in place is an interesting issue, but that sounds like  
15 it may be an issue for another day. At this point no one's  
16 asking me to take any action with respect to the presence or  
17 absence of a litigation hold, so I don't know that there's -  
18 I understand the parties have divergent views as to whether  
19 it was necessary here, but I'm not sure if there's anything  
20 to decide in that regard.

21 The third topic, the Port Authority's search for  
22 responsive documents must include all persons who could  
23 reasonably be expected to possess responsive documents,  
24 which I think is probably a correct statement as a matter of  
25 law. In its response the Port Authority says, "The Port

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2 Authority has requested all of its employees involved in  
3 working on sizing the toll increase and ten-year preliminary  
4 capital plan to provide all of their documents and emails  
5 relating to this work." Mr. Mulry, is it plaintiff's  
6 position that that universe is deficient and if so how?

7 MR. MULRY: Judge, this is an issue that we're  
8 raising for the court so you're aware of it's a concern that  
9 a selected group of individuals have been asked to collect  
10 documents and in some cases self-collect documents. We  
11 can't - we're not in a position to say that there are other  
12 people who have responsive documents that may come out in  
13 discovery, but this is an issue we wanted to raise with the  
14 court and with Port Authority at this stage so that we're  
15 not addressing it hopefully at a later stage in the case.

16 But I don't think there's a question for the  
17 court, issue for the court to resolve at this point.

18 THE COURT: No, I mean, look, as I understand the  
19 Federal Rules of Civil Procedure, party's obligation is, a  
20 party who receives a discovery request has the obligation,  
21 if they're not objecting to the request, to produce all  
22 documents in its possession, in the party's possession,  
23 custody, or control, and concomitant with that is an  
24 obligation to search all repositories or locations which  
25 could reasonably be expected to have responsive documents.

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2           You know, I suspect the individuals in the toll  
3 booth at the George Washington Bridge probably are not  
4 someone whose files need to be searched, if they have any  
5 files. You know, there are other people higher up in the  
6 Port Authority whose files do have to be searched, and I  
7 mean at least facially it doesn't appear that there's a  
8 deficiency in the size of the circle the Port Authority has  
9 drawn for the document search. I mean if you think there's  
10 - I mean and maybe you agree, at least at this point  
11 facially, at least it appears that the circle's been  
12 appropriately drawn.

13           MR. MULRY: At this point we don't have a basis  
14 to say it's not been appropriately drawn. But we have a  
15 concern that it's --

16           THE COURT: Yeah, well, I mean --

17           MR. MULRY: -- it's a small group.

18           THE COURT: It's the responding party's  
19 obligation to draw the circle in the first instance, and if  
20 an appropriate repository has not been searched, the party  
21 receiving the document request cannot assert as a defense,  
22 well, my adversary didn't tell me to search X's files. But  
23 I mean, again, it sounds like there's no issue on this  
24 matter. I mean, Miss Miller, do you want to add anything?

25           MS. MILLER: No, Your Honor, as I indicated in my

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2 letter though on the 12<sup>th</sup>, we expanded it beyond those who  
3 were working in management and budget and the executive  
4 staff to include at counsel's request anybody in media  
5 relations. We have three or four people in that category  
6 whose computers are being searched also.

7 THE COURT: All right. The next topic, the  
8 review of responsive paper and electronic documents  
9 including emails should be conducted by attorneys and not be  
10 a self-selection by custodians. Again, in the Port  
11 Authority's response it says, I think this is the third  
12 sentence in the Port Authority's position, "Moreover, with  
13 the exception of Karen Eastman, at their request the law  
14 department assisted each of these individuals searching  
15 their computers." And that is they didn't search, the law  
16 department didn't search paper documents, the law department  
17 just assisted with the computer search, Miss Miller, is that  
18 what that means?

19 MS. MILLER: No, the law department requested any  
20 paper files, but in addition the law department is searching  
21 not only emails, assisted these individuals searching not  
22 only emails but any stored files. If somebody created a  
23 file in their computer for toll and fare increase, for  
24 instance, any documents stored in that file are also being  
25 searched. So it's not just emails. It's any document in

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2 their computer, in their computer files, or any hard copies.

3 THE COURT: But, for example, Mr. Foye - I'm just  
4 trying to understand a little bit more what the Port  
5 Authority's position is here. With respect to Mr. Foye, for  
6 example, were counsel involved in the search of Mr. Foye's  
7 paper documents for responsive documents?

8 MS. MILLER: Not counsel, Your Honor, the law  
9 department. We had --

10 THE COURT: I think the law department - law  
11 department's attorneys, is it not?

12 MS. MILLER: No, it's a paralegal specialist and  
13 a technical person employed by the Port Authority --

14 THE COURT: I see.

15 MS. MILLER: -- who had the search terms which I  
16 put in my letter, were very, very broad search terms, and  
17 the paralegal specialist and the law department's technical  
18 services person together went in to the computers and --

19 THE COURT: No, I'm talking about the hard copy  
20 files, who made, who reviewed Mr. Foye's hard copy files for  
21 his responsive documents?

22 MS. MILLER: None have been reviewed yet. The  
23 collection has just been completed of documents. Those will  
24 be reviewed by counsel. The size of this collection was  
25 pretty enormous. And the search terms used were fairly

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2 broad. So we've now pulled in fares and tolls from the  
3 airports, so we now have collected thousands of documents  
4 and we have to go through those and cull them down. But  
5 we'll probably have some paralegals working on this as well  
6 as attorneys, Your Honor, because we don't have enough staff  
7 to staff several thousand documents with attorneys.

8 THE COURT: Mr. Mulry, is there - I'm not aware  
9 of any legal authority that says counsel needs to be  
10 involved in the initial selection of documents to be  
11 produced. Counsel certainly has an obligation to explain to  
12 his or her client what a Rule 34 requests means and what  
13 obligations a Rule 34 request gives rise to, but I don't  
14 know - certainly, there's nothing wrong with counsel going  
15 out and asking to look through the client's file cabinets or  
16 look through the computer itself, but I'm not aware of any  
17 legal authority that says that's what counsel must do.

18 MR. MULRY: Well, the --

19 THE COURT: What seems to be what you're  
20 advocating in the AAA's position.

21 MR. MULRY: The Pension Committee case does say  
22 that one may not place total reliance on an employee to  
23 search and select what the employee believes to be  
24 responsive without any supervision from counsel. Because  
25 someone who is not counsel and understanding the case and

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2 the obligations may not know what to search for, what is the  
3 scope of relevant documents. And that's the concern we  
4 have, particularly with respect to the high level people who  
5 from the Port Authority letter it seems were doing a self-  
6 selection of documents, and then documents were placed to a  
7 secure link.

8 Now, the Port Authority response in this letter  
9 indicates that the law department assisted. It's clear what  
10 that assistance is, and it's apparently not attorneys. So  
11 the concern we had in putting these issues before the Port  
12 Authority and the court was in making sure that it's clear  
13 that what the Port Authority is doing in collection of  
14 documents should comport with the obligation and that it  
15 would not be sufficient for the Port Authority employees to  
16 simply look through their files and decide what is and is  
17 not relevant.

18 THE COURT: Well, what do you believe has to be  
19 done?

20 MR. MULRY: Well, the attorneys --

21 THE COURT: That's, at least in my experience in  
22 practice, that that - it was not uncommon for the attorney  
23 to either speak with the client or to draft written  
24 instructions to the client telling the client what needed to  
25 be produced, but it was the exceptional case where counsel

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2 in the first instance went out and looked through the file  
3 cabinet.

4 MR. MULRY: Well, here what was reported was it  
5 seemed as if employees were being asked to decide what it is  
6 relevant based on a description of the document requests.  
7 The --

8 THE COURT: Well, if that's - even if that's -  
9 well, were they being asked to decide what was relevant or  
10 were they being asked to retrieve certain categories of  
11 documents?

12 MR. MULRY: Well, that's unclear. Part of what  
13 we were doing here, given where we are in discovery, is  
14 laying out issues - and just so you understand the context  
15 of the letter, based on Miss Miller's schedule, we didn't -  
16 she was not available to meet and confer until the 13<sup>th</sup>. I  
17 was unfortunately unavailable that day. So we met and  
18 conferred --

19 THE COURT: The letter is very helpful. I've got  
20 no negative comments about the letter. I found the letter  
21 very helpful.

22 MR. MULRY: Well, just so you're aware that the  
23 letter was essentially drafted Thursday night to Friday, so  
24 the Port Authority positions - this is not a letter where  
25 both sides were hashing out what the various positions were.

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2 You have our position and then the Port Authority position  
3 which we saw for the first time late Friday, and then it was  
4 simply filed.

5 So one thing we wanted to do, in this letter,  
6 raise the issues we saw based on the representations that  
7 had been made so far and what had been given to us in the  
8 responses. So some of the responses we've received from the  
9 Port Authority in this letter may address some of the  
10 issues, but we're not doing the production. They're doing  
11 that.

12 I think a big goal with a lot of these categories  
13 is to make sure that the parties and the court are aware of  
14 what has to happen going forward so that we're not six weeks  
15 down the road having discovery motions.

16 MS. MILLER: Your Honor, may I respond?

17 THE COURT: Go ahead.

18 MS. MILLER: As I said in my letter of June 8 to  
19 Mr. Mulry, we have gone well beyond what we think would be  
20 required. We've expanded the universe of people whose  
21 computers are being searched. The individuals who were  
22 asked to connect to a link and provide the documents  
23 according to the search terms that I gave them, and as I  
24 told this court, and they're in my letter of June 8, they're  
25 very broad search terms - tolls, fares, you know, toll

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2 increases, extremely broad search terms. These would bring  
3 in anything connected to that, including anything related to  
4 the consolidated bonds or - it's going to bring in thousands  
5 of pages because they're such broad terms.

6 But I selected these terms. I worked with the  
7 paralegal specialist and the technical service person who  
8 was setting up the links. As it turned out, most of those  
9 people who had exempt computers - and when I say exempt, our  
10 technical service is not authorized to go into their  
11 computers because of security reasons. We're talking about  
12 the executive director, the deputy executive director,  
13 people at that level. Those people reached out to us and  
14 said, no, come and help us, do the link and unload the  
15 documents. With the exception of Karen Eastman, virtually  
16 everybody in that category has had our paralegal specialist  
17 and our technical service person going to their computers to  
18 download the documents.

19 And I've been supervising, to the extent I can,  
20 Your Honor, I'm not a technical person. I really can't tell  
21 them how to do this. You know, I can just explain to them  
22 the universe of documents we're looking for and that we want  
23 to get a greater universe and then we'll cull out from that  
24 universe what's related to this action and produce it. So  
25 it's not like we started narrow. We started extremely

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2 broad.

3           THE COURT:    To the extent that this subject  
4 matter needs a ruling, I don't think that counsel needs to  
5 be involved at the initial search of the repositories, needs  
6 to physically conduct a search of the paper files or needs  
7 to physically conduct the search of the computers. I mean  
8 it is incumbent upon counsel to ensure that the client  
9 understands what responsive documents needs to be produced,  
10 and if counsel fails to do so, the client may pay the price.  
11 But to the - it does - I mean it does not sound - it does  
12 not sound like there's a basis at this time for an order to  
13 the Port Authority to have greater involvement by counsel  
14 with respect to the collection of documents.

15           All right, the next item is the Port Authority  
16 should be required to search the emails of commissioners,  
17 and, again, I mean it sounds like the commissioners' emails  
18 are being searched.

19           MR. MULRY:   Yes, I believe it seems that the  
20 commissioners are searching their own emails. With respect  
21 to that, sort of following in Your Honor's ruling, one thing  
22 AAA should be advised which commissioners' emails have been  
23 searched and which have not so that we can determine if  
24 subpoenas would be necessary, and at that point we would  
25 want to know if the Port Authority would be accepting

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subpoenas on behalf of the commissioners and representing them.

THE COURT: Let me ask you --

MS. MILLER: We'd be --

THE COURT: Let me ask you a question, then I'll hear anything you want to tell me. Is there any objection to advising plaintiffs which commissioners' emails are being searched and from which responsive documents are being produced?

MS. MILLER: Most of the commissioners are searching their own, Your Honor. In one or two cases, I know of one case where the commissioner invited the Port Authority paralegal specialist and our law department technical services person to go and download documents from his computer. That's Commissioner Lindford. I don't know if that was done in any other cases or whether the commissioners, and, again, these are their private computers. They're in their own homes or their own offices. They're not Port Authority computers, and the commissioners, with the exception of David Sampson, do not have Port Authority email.

So we will either have a certificate from them if they have no emails or documents on their computer, that they have nothing, or we'll provide whatever documents that

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2 particular commissioner has provided to us and indicate  
3 which commissioner those documents came from.

4 THE COURT: All right, it sounded like what Mr.  
5 Mulry was seeking was either confirmation that emails are  
6 being produced from all, responsive emails are being  
7 produced from all commissioners' computers or identification  
8 of any commissioners who have refused to have their  
9 computers searched. Am I understanding you correctly, Mr.  
10 Mulry?

11 MR. MULRY: Yes, we want to know what is being  
12 searched, what is not being searched.

13 THE COURT: He just wants to know whether or not  
14 you're capturing the emails of all the commissioners or some  
15 commissioners --

16 MS. MILLER: As far as I know --

17 THE COURT: -- who are not cooperating.

18 MS. MILLER: As far as I know, Your Honor,  
19 everyone is cooperating. We haven't heard from anyone who  
20 said they wouldn't do the search. I believe we are getting  
21 certificates from several of the commissioners who say they  
22 have nothing on their computer.

23 THE COURT: All right. Well, when you complete  
24 the production, is there any objection to either confirming  
25 that all commissioners' computers have been searched or

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2 identifying the commissioners whose computers have not been  
3 searched? Any objection to doing that?

4 MS. MILLER: I don't have any objection to doing  
5 that as long as the court understands the computers were  
6 searched by the commissioners or their staff at their  
7 business. We didn't go in and do the search. We provided a  
8 link to the commissioners to give us any documents.

9 THE COURT: Yeah, I understand, but I'm presuming  
10 the commissioners wouldn't dissemble to the Port Authority's  
11 law department.

12 MR. MULRY: And, Your Honor, presumably the  
13 commissioners will be searching for hard copies as well I  
14 would expect.

15 THE COURT: Is that - are the commissioners also  
16 searching for hard copy, Miss Miller?

17 MS. MILLER: It's my understanding they were  
18 asked to provide, those who had files, but I don't believe  
19 anybody has provided any. Again, I can't say for certain,  
20 but I don't believe anybody has provided any hard copy  
21 files.

22 THE COURT: Well, I mean, again, this is not -  
23 what I think Mr. Mulry is looking for is he's just looking,  
24 he's seeking to make sure that the commissioners' paper and  
25 electronic files have been reviewed for responsive documents

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2 and that responsive, non-privileged documents have been  
3 produced. I mean it sounds like if some commissioner has  
4 been reluctant or unwilling to cooperate with the law  
5 department, he's willing to serve a subpoena on the  
6 commissioner, but he's just trying to find out whether or  
7 not that task needs to be done, which seems to me to be a  
8 fair question.

9 MS. MILLER: Yes, Your Honor, I would be happy to  
10 let him know. As far as I know, everybody has been very  
11 cooperative.

12 THE COURT: Okay. All right. The Port Authority  
13 should be required to state if a search for responsive  
14 documents was conducted when it responds that there are not  
15 responsive documents. I think that's implicit and probably  
16 required under Rule 26. Isn't there a requirement about  
17 what it means when you've sign a discovery response? Hold  
18 on one second, let me just find the provision.

19 (pause in proceeding)

20 THE COURT: 26(g)(1), "Every disclosure under  
21 26(a)(1) or (a)(3) and every discovery request, response, or  
22 objection must be signed by at least one attorney of record  
23 in the attorney's own name or by the party personally if  
24 unrepresented and must state the signer's address, email  
25 address, and telephone number. By signing it, an attorney

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2 or party certifies that to the best of the person's  
3 knowledge, information, and belief formed after reasonable  
4 inquiry, (b) with respect to a discovery request, response,  
5 or objection, it is consistent with the rules and warranted  
6 by existing law or by a non-frivolous argument or extending  
7 or modifying or reversing existing law or for establishing  
8 new law, (2) not interposed for any improper purpose such as  
9 to harass, cause unnecessary delay or needlessly increase  
10 the cost of litigation, and (3) neither unreasonably nor  
11 unduly burdensome or expensive considering the needs of the  
12 case, prior discovery in the case, and the amount in  
13 controversy and the importance of the issues at stake in the  
14 action."

15 I would think the "after reasonable inquiry"  
16 language would require that counsel perform, counsel make  
17 reasonable inquiry before confirming that there are no such  
18 documents.

19 MR. MULRY: Yes, Your Honor, based on what's been  
20 said here and in the letters, our understanding is that when  
21 the Port Authority says there are no documents, they're  
22 saying that a search was conducted and that there are no  
23 responsive documents.

24 THE COURT: Well, yeah --

25 MS. MILLER: That's not quite correct, Your

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2 Honor.

3 THE COURT: Pardon?

4 MS. MILLER: That's not quite correct. I did  
5 make a reasonable inquiry. As I told the court the last  
6 time I was here, I assembled a large number of people in a  
7 conference room that was not only Mike Fabiano but everybody  
8 who worked with him on putting together the papers, his  
9 affidavit and the exhibits, who extracted the information  
10 about the interstate transportation network. I had all  
11 those people gathered in a room, and we went through each  
12 and every document request.

13 And it was explained to me as I've tried to  
14 explain to the court, perhaps not too clearly, tried to  
15 explain to counsel that the Port Authority keeps its  
16 financials and keeps its actual finances, they are pooled.  
17 The consolidated bond fund is pooled, our revenues are  
18 pooled. We are a pooled agency by statute. So a number of  
19 the documents that plaintiff is requesting don't exist.  
20 There are none because that's not how we keep our records.  
21 And, therefore, I didn't make a search for records when  
22 somebody told me you're not going to find any such records  
23 because that's not how we keep our financials. I didn't  
24 then say, well, make a search for them anyway.

25 So my inquiry was are there such records? If

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2 there are potentially records, then I asked them to make a  
3 search. If they told me the Port Authority does not keep  
4 those kind of records because of the nature of the agency,  
5 then I did not ask them to make a search, and I simply  
6 responded there are none. And there were a number of  
7 requests that were for, specifically for documents related  
8 to the interstate transportation network, and we don't have  
9 those documents other than the exhibits to the affidavit of  
10 Michael Fabiano that was submitted in support of our motion  
11 to dismiss and in opposition to the application for a  
12 preliminary injunction.

13 THE COURT: Well, let me come back to Mr. Mulry  
14 for a minute. Mr. Mulry, suppose in some circumstances an  
15 actual search need not be produced as long as there's a  
16 reasonable inquiry, as the rule requires. I mean, if, you  
17 know, to take a simple example, if by the nature of the  
18 request the responding party knows that it doesn't have  
19 responsive documents, I'm not sure that a search actually  
20 needs to be done.

21 If, for example, you know, I'm assuming, and maybe  
22 rightly or wrongly, that Miss Miller has never intended a  
23 Super Bowl, and I mean if you served a document request  
24 asking for all documents concerning Miss Miller's attendance  
25 at Super Bowl X, I mean I'm not sure - and, again, assuming

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2 Miss Miller knows she's never attended the Super Bowl, I'm  
3 not sure someone needs to go out and search for responsive  
4 documents.

5 MR. MULRY: I think that's correct, Your Honor.  
6 It depends on the circumstances.

7 THE COURT: Yeah.

8 MR. MULRY: Here, the statement that there are  
9 not documents was stated for a number of the requests, and  
10 as I understand the argument, the argument is that you have  
11 the bridges and tunnels, you have the Port Authority, I'm  
12 sorry, you have the airports, you have the World Trade  
13 Center, those various lines of business. Because all the  
14 records are consolidated, my understanding is that there are  
15 no records or there are few records for the ITN, which  
16 creates a significant problem where Second Circuit law is  
17 that the ITN revenues can only be used for ITN expenses.

18 So what many of the discovery requests are  
19 directed to is the issue of how do you account for the money  
20 that comes into the ITN and then the money that goes out?  
21 Where does the money that go out go and is it going outside  
22 the ITN? And not to get too afield from the topic we're on,  
23 but that's why the reserve funds are so important. There's  
24 a general reserve fund which has a requirement of 10 percent  
25 of the outstanding bonds to be put in that reserve fund;

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2 then there's also a consolidated bond reserve fund that has  
3 monies from all parts of the Port Authority going into it.  
4 And we know, for example, in three years, in a three-year  
5 period in the late 2008/2009/2010, approximately a billion  
6 dollars from those went out of the bond fund for various  
7 capital expenditures, which from the public records it  
8 appears that some significant portion of that went to the  
9 World Trade Center.

10 Well, where does that money come from? The World  
11 Trade Center is not making money, not bringing money into  
12 the consolidated funds since 2001. Is it the Port  
13 Authority's position that all of those funds are coming from  
14 the airports? Because we know from the public records that  
15 the bulk of the revenues for the Port Authority on a whole  
16 come from bridges and tunnels on the one hand and airports  
17 on the other. So that goes to the issue that we're seeking  
18 discovery on of funds from the ITN going into these reserve  
19 funds over the years and then at a certain point monies  
20 taken out for capital expenditures, including expenditures  
21 outside the ITN.

22 And from the discovery responses the Port  
23 Authority has no control, no check on what's the ITN money  
24 going into the reserve funds and what's the ITN money coming  
25 out. And that, you know --

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2 THE COURT: Well, maybe, maybe not. I mean there  
3 are limitations inherent in document requests. The response  
4 there are none may be entirely accurate, but the documents  
5 may exist in another form or maybe the existence of checks  
6 and controls is something that's better explored in  
7 deposition. I mean, look, what inference is drawn from the  
8 discovery response is I suppose a function who's drawing the  
9 inference, but -

10 I guess the issue here is whether or not there's a  
11 good faith basis, after reasonable inquiry, for the response  
12 there are none. And I mean if you have questions about the  
13 correctness of a response, there are none, you know, I think  
14 there are two alternatives open to you. You can call Miss  
15 Miller and see if, and, you know, have a meet and confer  
16 over the telephone, or, alternatively, in terms of tracing  
17 the ITN funds in the manner you've just described, you can  
18 explore that at a deposition.

19 MR. MULRY: And we have noticed the deposition of  
20 Rosemary Chercolo who's been identified as someone within  
21 Mr. Fabiano's group at the Port Authority --

22 MS. MILLER: Well, I was told --

23 MR. MULRY: -- from among other things, that  
24 purpose.

25 MS. MILLER: Miss Chericolo is being sought to

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find out whether there are any additional documents. Obviously, Mike Fabiano, who did the affidavit in support of the motion to dismiss, would be the person to depose as to where the funds come in and where the funds come out. But does the Port Authority know where the funds come from and where they do? Absolutely. Of course, we do. Mike Fabiano could not have created his affidavit if he didn't know where the monies came into the interstate transportation network and where they went out.

And a significant portion of them go out to the PATH train but also a significant portion will be going out for the capital plan which requires, as this court knows, you know, the replacement of the suspenders on the George Washington Bridge, raising the Bayonne Bridge, rebuilding the Pulaski Skyway. There are a number of major capital projects in the interstate transportation network, and we know where those fund go. We know where the bonds are because those are the only tax-free bonds.

So because we consolidate our monies doesn't mean we don't know where the monies go. We do know where the monies go.

THE COURT: Okay. I think we may be getting into - I'm not sure that really addresses the discovery issue here, but I mean that's more of a substantive contention

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2 than a discovery issue. I mean, you know what, what  
3 sometimes happens, Mr. Mulry, is, in many litigations, is  
4 that a party will serve an initial discovery request, get  
5 some documents, wonder why there aren't other documents,  
6 take a deposition of a witness or two, and get a better  
7 understanding of what classes of documents the adversary has  
8 that may be relevant and then serve a second round of  
9 document requests.

10 MR. MULRY: Yes, Your Honor, that's what --

11 THE COURT: I mean it's --

12 MR. MULRY: -- we're anticipating.

13 THE COURT: -- not unusual for things to happen  
14 that way.

15 MR. MULRY: Yes. Your Honor, there was one topic  
16 that we would skip, just to make you aware of. It does not  
17 have two different positions. Just to advise the court --

18 THE COURT: The email search terms?

19 MR. MULRY: Yeah, the Port Authority was going to  
20 advise us of the search capability of their system, because  
21 we agree, the search terms that were in Miss Miller's letter  
22 are very broad, and if the search can be done with two  
23 terms, with an "and" or within 20 words, that may be more  
24 streamline. We also this - this gets to an issue we started  
25 to talk about a little earlier. We, for example, believe

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2 the search terms should include search terms related to the  
3 consolidated bond reserve fund and the general reserve fund  
4 because those are important issues with respect to where  
5 does the ITN money go and how is it accounted for.

6 MS. MILLER: Really, we wanted to do a broad  
7 search, Your Honor, to avoid repetitious searches, and we'd  
8 rather cull through the documents that we have and eliminate  
9 those pretty quickly that relate to the airports and other  
10 facilities.

11 But I am told, and, again, I haven't spoken to the  
12 technical person, but I spoke to the paralegal specialist  
13 working with him, that because the search terms that I put  
14 in were so broad, that if consolidated bond would come up in  
15 connection with tolls, I mean if I put in tolls, fares,  
16 interstate transportation network, anything that related to  
17 consolidated bonds or the general reserve fund would be  
18 pulled up in that search because it's an overly broad  
19 search.

20 So rather than go back and do a second search at  
21 this time and risk being criticized for not having pulled in  
22 enough documents, we're pulling in all the documents, and  
23 we'll go through them. So that consolidated bond and  
24 reserve fund would have been pulled in if it was any way  
25 connected to tolls, that's what I'm told.

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2 THE COURT: Go ahead.

3 MR. MULRY: I don't think that we would agree  
4 that necessarily all documents related to the bond fund  
5 would necessarily be captured in a search that asks for  
6 tolls and fares, but that's why we would want some input  
7 into the issue of --

8 MS. MILLER: Well, that's correct, but we don't -  
9 -

10 MR. MULRY: -- search terms.

11 THE COURT: I'm looking at your - I think it's  
12 your letter, Miss Miller, it's exhibit B. It is your  
13 letter. Your letter dated June 8, 2012, page 3, the search  
14 terms suggested are as follows: toll, fare, toll increase,  
15 toll increase, fare increase, toll hike, etc. And among  
16 those terms, consolidated bond fund and reserve fund does  
17 not appear --

18 MS. MILLER: No, it does not appear, Your Honor,  
19 but I'm told it would come up.

20 THE COURT: But I'm not sure someone can tell you  
21 with certainty that those terms are going to retrieve  
22 documents with those two expressions in them.

23 MS. MILLER: You know, I made a preliminary  
24 inquiry, and I was told that if consolidated bond or general  
25 reserve fund, in connection with toll or fare or the

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2 interstate network was a topic, that it would come up. But  
3 if we put in consolidated bond reserve fund and general  
4 reserve fund, we're going to pull in thousands and thousands  
5 of documents because we're going to pull in every other  
6 facility for which we issued bonds, which is what we do on a  
7 regular basis, Your Honor. So we're talking thousands and  
8 thousands of documents.

9 I can inquire further, but I was told that it  
10 would be pulled up.

11 THE COURT: Well, what you may want to do, and I  
12 say this by way of suggestion not by way of direction, is  
13 that with e-discovery usually the bulk of the expense is not  
14 incurred doing the electronic search itself. The bulk of  
15 the expense is the attorney time that occurs or that is  
16 expended later when the documents are reviewed for, or  
17 manually reviewed by a warm body for responsiveness and  
18 privilege, that the electronic search itself is usually not  
19 a terribly expensive undertaking.

20 What you may want to do, and again, I say this by  
21 way of suggestion, not by of an order, but what you may want  
22 to do is when you do the electronic search, do the search  
23 including the electronic term search, consolidated bond fund  
24 and general reserve fund I think were the two terms that Mr.  
25 Mulry mentioned, and maybe just segregate the results.

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2 Don't search it manually, save yourself that expense, and  
3 see if the plaintiffs are happy with the response they get  
4 to the other terms. And this way if we need to litigate  
5 about the general bond fund, the search terms consolidated  
6 bond fund or general reserve fund, at least the electronic  
7 documents will have already been culled, will already been  
8 set aside. But don't do the manual review yet. Do you  
9 understand what I'm - I'm not terribly sophisticated when it  
10 comes to e-discovery terms, so maybe I'm not communicating  
11 effectively. I hope I am. Do you understand what I'm  
12 suggesting?

13 MS. MILLER: I do, but I would ask that the  
14 court, if we're going to do something like that, we should  
15 do consolidated bond fund and toll, because otherwise we're  
16 going to pull in everything. Everything. I mean we really  
17 are going to have --

18 THE COURT: That's a fair point. That's a fair  
19 point.

20 MS. MILLER: For the - and this would be for Port  
21 Authority computers only, correct? You're not asking us to  
22 go back to the commissioners?

23 THE COURT: Well, the discovery obligation  
24 extends to documents in the party's possession, custody, or  
25 control. So it's a question of what is in the Port

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2 Authority's possession, custody, or control.

3 MS. MILLER: Well, technically we don't control  
4 the commissioner's private computers. I mean --

5 THE COURT: Well, if --

6 MS. MILLER: We've asked --

7 THE COURT: -- their private computers are not  
8 within your possession, custody, or control, the search  
9 obligation doesn't extend to them.

10 MS. MILLER: Right, but we have, in this  
11 litigation we have gone the extra mile and asked them to do  
12 the search on all the search terms that were indicated in my  
13 letter.

14 THE COURT: But I mean it does sound like the  
15 search terms you have on page 3 of your June 8 letter are  
16 going to yield a wealth of documents that the plaintiffs  
17 will find of interest. So it may be that you'll never have  
18 to, we'll never have to cross the bridge about consolidated  
19 bond fund or general reserve fund. My understanding is it's  
20 not an expensive undertaking to run the electronic search  
21 and segregate the product of specific search terms. But,  
22 again, I say that by way of suggestion not by of order.

23 All right. The next topic is privilege, and it  
24 looks like the response is that no privileges have been  
25 asserted.

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MR. MULRY: That is the response.

THE COURT: All right, so there's nothing to fight about there. The next topic I'm a little at sea at. The Port Authority should be required to advise of any repositories that may have responsive documents that have not been searched and the reason why. I mean, Mr. Mulry, in any organization there's always a chance of things being misfiled. You know, if there's a reasonable prospect that a repository has responsive documents, it's got to be searched. I'm not sure what you're looking for here.

MR. MULRY: This goes primarily to one of the issues we discussed at the last conference. If, for example, there are backup tapes that under Rule 26 arguably would be not reasonably accessible, we are entitled to know that the Port Authority has those and they're not being searched, and we can discuss whether or not that becomes an issue. Where this is especially of concern is if the representation is that after 120 days emails on the Port Authority system are deleted and then, as I understand it, are not retrievable again, we want to know if that is, in fact, if that's correct or if there are backup tapes that exist such that those can be recreated and there may be an issue under Rule 26 of whether those should be searched or under what conditions. But it's primarily understanding are

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2 there repositories, particularly with respect to electronic  
3 information, that have not been searched for some reason  
4 such as their backup tapes --

5 THE COURT: So you're only look for  
6 identification of repositories that haven't been searched  
7 because defendant is taking a position that they're  
8 reasonably accessible?

9 MR. MULRY: Yes, or for some other reason. Not  
10 really the issue of something's been misfiled so there may  
11 be a file cabinet out there where something was placed. It  
12 is of particular concern with the issue of emails that are  
13 automatically deleted. Is it correct that those --

14 THE COURT: I mean I'm just trying to get, trying  
15 to get some focus here. Are you looking for repositories  
16 that fall within Rule 26(b)(2)(b)?

17 MR. MULRY: Primarily --

18 THE COURT: (b)(2)(b) reads "specific limitations  
19 on electronically stored information. A party need not  
20 provide discovery of electronically stored information from  
21 sources that the party identifies as not reasonably  
22 accessible because of undue burden or cost."

23 MR. MULRY: Yes, that's --

24 THE COURT: Is that what you're looking for?

25 MR. MULRY: That's the primary basis for this

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section.

THE COURT: All right. Are there any such repositories, Miss Miller? And understand he's not seeking to compel discovery of those repositories right now. He's just seeking identification of any such repositories if they exist.

MS. MILLER: It's my understanding, Your Honor, and I've made reasonable inquiry, but I can always make further reasonable inquiry, that emails that are deleted after 120 days are not recoverable, that they are not backed up. That backup is for saved files.

THE COURT: All right. Does the Port Authority have backup tapes?

MS. MILLER: The Port Authority has backup, but it's my understanding that it's for saved files. If I create a litigation document and I save it in my computer in the share drive, and my computer is destroyed, it's my understanding that that document has been saved on backup tapes because I intended to save it.

THE COURT: Okay.

MS. MILLER: So if I took an email out of the regular email system and I saved that email in a folder, in the share drive, I have a share drive as well as a U drive on computer and I put it in the share drive and I saved it

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2 as a document, that that email would be preserved, that it  
3 would be backed up because I've now saved it as a regular  
4 document just as a Word document. That's my understanding,  
5 but I'm not a technical person, and I don't know how long  
6 those backup tapes are maintained. My only experience with  
7 it directly was after 9/11 when I was fortunate enough to  
8 have most of my files saved on backup.

9 THE COURT: All right, well, I mean with respect  
10 to this item, what I'm inclined to do is direct - I'm not  
11 trying to put you on the spot here, Miss Miller, or ask you  
12 to describe things that you don't have a full understanding  
13 of. But what I'm inclined to do is direct the Port  
14 Authority to describe to plaintiffs what backup tapes exist  
15 and what information they capture.

16 Again, I hasten to add that I'm not ordering that  
17 backup tapes be searched or restored at this time. That's  
18 an issue that involves a different analysis, and that's an  
19 issue that if we come to that issue, if we come to that  
20 matter, it would need to be briefed, but he's at least  
21 entitled to know what exists and what kind of information is  
22 captured on the backup tapes. Okay?

23 The Port Authority should not be permitted to  
24 redact non-privileged information from documents. Mr.  
25 Mulry, why are they not permitted to redact irrelevant

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2 information?

3 MR. MULRY: Well, Your Honor, they're entitled to  
4 withhold or redact information on the basis of privilege,  
5 but as far as selecting information that they consider not  
6 relevant --

7 THE COURT: Let me pose the question differently.  
8 What entitles you to discovery of irrelevant information?

9 MR. MULRY: Well, if it is a document that's  
10 relevant to the case --

11 THE COURT: Well, sometimes part of a document's  
12 relevant and part of it's not.

13 MR. MULRY: But if a document's relevant, the  
14 only basis for redaction is privilege.

15 THE COURT: No, if a document deals with multiple  
16 topics and some topics are relevant and some topics are  
17 irrelevant, what entitles you to discovery of the irrelevant  
18 topics?

19 MR. MULRY: Well, the - Your Honor, we've looked  
20 as far as finding authority for redaction of documents on  
21 the basis of relevance, and that is nothing I have found any  
22 authority for. Typically --

23 THE COURT: No, but I think the answer may lie in  
24 Rule 26 which sets the general guidelines for discovery as  
25 being relevance and non - relevant to a claim or defense and

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2 not privileged.

3 MR. MULRY: Well, then if Port Authority is  
4 entitled to redact information that they consider not  
5 relevant, then we would have to have a log of all those  
6 redactions --

7 THE COURT: By what authority?

8 MR. MULRY: So we would understand what's the  
9 basis for a redaction --

10 THE COURT: No, what requires a log of redactions  
11 on the grounds of irrelevance? The rules don't.

12 MR. MULRY: How are we to know why a document is  
13 redacted? Is it redacted on the basis of privilege?

14 THE COURT: You could ask. I mean right now we  
15 know they haven't redacted any - well, my understanding is  
16 they haven't asserted the privilege with respect to  
17 anything. That was one of the prior topics. But if you -  
18 look, if you get a document that's redacted and you want to  
19 know why it's redacted, pick up the phone and call Miss  
20 Miller. I mean if you ask, she's obligated to tell you at  
21 least why it was redacted, whether it was relevance,  
22 privilege, or something else.

23 MR. MULRY: Because we have to be able to address  
24 that if necessary to the court as to there's a redaction and  
25 the reason for, and if we disagree with the redaction, then

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THE COURT: Well, I mean --

MR. MULRY: -- we'd have to be able to realize that.

THE COURT: Part of the problem is that there's nothing in the rules that requires a list of documents withheld or redacted on the ground of privilege and carried to its logical extreme, requiring a redaction log, requiring a log of documents redacted on the grounds of irrelevance could lead to the requirement that you got to prepare a list of documents, that a party would need to prepare a list of documents withheld on the grounds of relevance which would mean that a party would need to log every document it hasn't produced.

MR. MULRY: No, I wouldn't suggest that.

THE COURT: Which is obviously ridiculous.

MR. MULRY: The issue is it's a document that is relevant to the case.

THE COURT: Well, sometimes - but, no, I mean sometimes a document deals with multiple issues, and some of the issues are relevant and some of them are irrelevant. I mean I suppose you could have a document, you know, itinerary for, or agenda for a meeting and one of the topics might be a toll hike, and topic number 10 may be where the

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2 holiday party's going to be this year. And the toll hike  
3 topic might be relevant but the topic on where the holiday  
4 party's going to be held clearly isn't. I mean sometimes a  
5 document deals with multiple issues, some of which are  
6 relevant, some of which aren't.

7 MR. MULRY: Your Honor, I would ask that we'd be  
8 given the opportunity, if we decide to raise this again to  
9 you with case authority, but we'll certainly defer to your -  
10 -

11 THE COURT: I'm not aware -

12 MR. MULRY: -- view of the case right now.

13 THE COURT: I'm not aware of anything that  
14 requires a log of documents redacted on the grounds of  
15 irrelevance. And, again, as I said before, if you get a  
16 redacted document and you want to know why it was redacted,  
17 you're free to call Miss Miller, and she would have to tell  
18 you what the basis for the redaction was, you know, whether  
19 it's relevance or privilege or something else. I mean do  
20 you want to add anything on that, Miss Miller?

21 MS. MILLER: No, Your Honor, in most cases -  
22 there weren't a lot of redactions. Exhibit H comes to mind  
23 in the second document production, although I believe there  
24 were some in the Rule 26 voluntary disclosure also, and what  
25 I did was I redacted - exhibit H had to do with the

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2 allocations from the consolidated bond fund, and I redacted  
3 the financial information for aviation, the World Trade  
4 Center, port commerce, and I left all of the information in  
5 for the interstate transportation network.

6 I didn't redact the terms World Trade Center or  
7 aviation so that they could see that I was redacting --

8 THE COURT: Right, right, I understand.

9 MS. MILLER: -- because it was World Trade Center  
10 --

11 THE COURT: You left the label but not the  
12 content.

13 MS. MILLER: Right, but I believe I also did  
14 that, I tried to do that if I could with respect to the rule  
15 of voluntary disclosure so that they would see that I was  
16 redacting because it wasn't related, it was financial data  
17 not unrelated to the interstate transportation network. If  
18 I didn't in one case, I'd be happy to explain it.

19 THE COURT: No, that makes - what you're  
20 describing makes perfect sense. All right.

21 The last area here is AAA's intention to make a  
22 motion to compel with respect to disputed areas of  
23 discovery. Basically to revisit the May 7 order. Mr.  
24 Mulry, if you want to make a motion arguing that broader  
25 discovery is appropriate, I'm happy to consider such a

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motion. I would only ask that I would the motion is going to add, is going to be based new or different arguments than were made in May. If it's just a rehash of what was said in May, it's going to get the same result.

MR. MULRY: We understand that, Your Honor, and we know that when you made that ruling, you did say you would look - that was an initial ruling based - it was actually at the first conference and there were no discovery requests or responses in front of you. So you had told us at the time you would look at that on a full record. So we're just alerting you to the fact that we will do that.

On issues, for example, such as the bond reserve fund and the general reserve fund, because Your Honor made t ruling in the context of a discussion of whether the AAA would get discovery with respect to funding sources for the World Trade Center, and Your Honor's ruling was that we would not get, he would limit it to the ITN. But we had not explored in that conference all the issues that were present in the case.

And so we would want to make clear, particularly if, as we go into depositions, as to what the parameters of discovery are, because we argue that they do go beyond that time period, but we would like to lay that out for you in a written motion.

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THE COURT: Yeah, that's fine. If you want to make a renewed application for broader discovery, you're free to do so. I'll get your papers, I'll get the Port Authority's response, I'll get your reply, and I'll hear you on it. That's - if you want to make such an application, feel free. Again, as long as you're going to make some new arguments. I just hope you're going to be asserting new arguments and not merely repeating what was said in May.

MR. MULRY: Would Your Honor want to set a schedule or do you want me to set that with Miss Miller and present that?

THE COURT: Well, I mean when do you want to make - when do you want to make it? I'll set a schedule right now; if you want to agree with Miss Miller on a schedule, that's fine too. Whatever way you want to do it.

MR. MULRY: Judge, we'd ask for two weeks to July 3.

MS. MILLER: Your Honor, I'm starting a trial on Monday in front of Judge Laura Taylor Swain, as I told this court.

THE COURT: Well, they're not going to be making it until July 3, so you're not going to have anything on Monday. So you don't have to do anything next week.

MS. MILLER: Right, well, the week after, the

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2 trial, it's not going to be over in a week. There are four  
3 plaintiffs, and it's going to take at least two weeks. So  
4 this trial is going to be going into July.

5 THE COURT: Maybe.

6 MS. MILLER: I'm pretty sure it's going into  
7 July. I can't see this trial even --

8 THE COURT: Trials usually take less time than  
9 you think they're gonna take. You usually get surprised.

10 MS. MILLER: If Judge Swain --

11 THE COURT: What kind of case is it?

12 MS. MILLER: It's a retaliation case.

13 THE COURT: Employment Title 7 retaliation?

14 MS. MILLER: Employment retaliation, there are  
15 four separate plaintiffs. So it will take a while because I  
16 can tell you right away that Paul Weiss has subpoenaed 25  
17 witnesses.

18 THE COURT: I don't even think group they had 25  
19 witnesses.

20 MS. MILLER: That, you know, unless they're  
21 prepared to cut their list, which they may be, but I don't  
22 know if they're going to cut it enough, and there's a  
23 holiday in the middle.

24 THE COURT: Well, maybe a holiday at the end, we  
25 don't know yet. I'd just be surprised if you have a

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2 retaliation trial that's going to take more than two weeks.  
3 Anything's possible, but who knows. Well, okay, so you'll  
4 be getting the papers on the 3<sup>rd</sup>.

5 MS. MILLER: Well, I won't be able to look at the  
6 papers until this trial is over, Your Honor, whether that's  
7 - you know, I'm sure it's not going to be over before the  
8 end of the week of July 6 because I know that the witnesses  
9 that they are putting on are going to take up all of June  
10 and the beginning of July.

11 THE COURT: It must have been some kind of  
12 retaliation.

13 MS. MILLER: Well, Paul Weiss is, if nothing, but  
14 thorough. They are putting in everybody.

15 THE COURT: Well --

16 MS. MILLER: I would ask that papers --

17 THE COURT: Tell you what, why don't we do this?  
18 Why don't we do two weeks from the conclusion of your trial?  
19 Or two weeks from July 3 whichever comes later.

20 MS. MILLER: Two weeks from July 3 is --

21 THE COURT: Two weeks from July 3 is July 17, or  
22 two weeks from the conclusion of your trial, whichever comes  
23 later. So if your trial ends on the 6<sup>th</sup>, your response  
24 would be due the 20<sup>th</sup>. If your trial folds, your response  
25 would be due the 17<sup>th</sup>. If your trial ends on the 3<sup>rd</sup>, your

1  
2 response would be due the 17<sup>th</sup>.

3 MS. MILLER: Well, can I ask for either the 17<sup>th</sup>  
4 or the 24<sup>th</sup>, Your Honor, simply because I'm taking a couple  
5 of days off in July that week.

6 THE COURT: Which week are you taking time off?

7 MS. MILLER: I'm taking the 18<sup>th</sup>, 19<sup>th</sup>, and 20<sup>th</sup>.  
8 So I would ask that it either be the 17<sup>th</sup>, which assuming,  
9 if Your Honor is correct and the trial is over by July 3,  
10 that's two weeks, or July 24.

11 THE COURT: Well, tell you what, why don't - all  
12 right, so you're out the 18<sup>th</sup> through the 20<sup>th</sup>. I'm happy to  
13 accommodate your vacation. Why don't we do this, why don't  
14 you send me a letter, you can have your secretary do it or a  
15 paralegal do it, just send me a one-sentence letter telling  
16 me when the case, when your retaliation case has concluded,  
17 and I'll set the date two weeks from that giving you the  
18 18<sup>th</sup>, 19<sup>th</sup>, and 20<sup>th</sup> off. Okay?

19 MS. MILLER: Very good, Your Honor, we'll do  
20 that.

21 THE COURT: What's the docket number of the case,  
22 do you have the docket number of the case before Judge Swain  
23 by any chance?

24 MS. MILLER: Well, there are four docket numbers.  
25 I can send the Court the docket numbers. I don't have it

1  
2 with me. It's the first -

3 THE COURT: Do you have one of them? I suspect  
4 they're going to be related on the ECF system. Do you have  
5 any of the docket numbers?

6 MS. MILLER: No, not off the top of my head. I  
7 can tell you that it's Eng v. the Port Authority, Young v.  
8 the Port Authority, Chin v. the Port Authority, and Chung v.  
9 the Port Authority, and I can call the court with the docket  
10 numbers. I can tell you --

11 THE COURT: It's E-N-G is Eng?

12 MS. MILLER: Eng, Christopher Eng.

13 THE COURT: Christopher Eng is enough, I can find  
14 it. Okay.

15 MS. MILLER: And they're consolidated for trial.

16 THE COURT: Yeah, I can find it.

17 MS. MILLER: So the four of them. I don't know  
18 if they're consolidated, because they're brought as four  
19 separate actions, the judge consolidated them for discovery,  
20 and then we decided just to consolidate them for trial.

21 THE COURT: Just knowing the lead case is enough.  
22 That's all I need to know. All right, so send me a letter  
23 when --

24 MS. MILLER: Christian Eng, it's Christian Eng,  
25 I'm sorry.

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THE COURT: Chris --

MS. MILLER: Christian, yes, Christian Eng.

THE COURT: Okay. All right, we'll give you two weeks, and if the two weeks bridges the 18<sup>th</sup> through r 20<sup>th</sup>, we'll give you the two weeks and three days. Okay? You'll do a reply a week after her opposition?

MR. MULRY: Yes, Your Honor.

THE COURT: Okay. I think that was everything in the letter.

MR. MULRY: One last point was to advise, Your Honor, that the parties anticipate that we will need to seek a modified discovery schedule from Judge Eaton, and at this point I don't know that the Port Authority knows when its supplemental production will be made, but I think both parties would be making that application to Judge Eaton. We can consult with you beforehand as to what schedule we would ask.

THE COURT: I'm not sure I'm involved in that in terms of what schedule you want to ask for.

MR. MULRY: We can then direct that to Judge Eaton.

THE COURT: Yeah, I don't have it for general pre-trial. I don't have it for scheduling. And in terms of what modification you want from Judge Eaton, I think that's

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2 something that's up to all counsel, not up to me. All  
3 right? All right, anything else from plaintiff's side we  
4 should be considering?

5 MR. MULRY: No, Your Honor.

6 THE COURT: Anything else from defendant's side?

7 MS. MILLER: No, Your Honor, thank you.

8 THE COURT: Okay, thank you all.

9 (Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Automobile Club of New York versus The Port Authority of New York and New Jersey, Docket #1:11-cv-06746-RKE-HBP, was prepared using digital electronic transcription equipment and is a true and accurate record of the proceedings.

Signature\_\_\_\_\_

Date: June 27, 2012